

ASSOCIATION AGREEMENT: DRIVING INTEGRATIONAL CHANGES

Vol. III

Monograph

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The collective monograph is devoted to the actual issues concerning the implementation of the Association Agreement between Ukraine and the member states of the European Union. In particular, the monograph examines the theoretical and practical aspects of various spheres of joint activities, as a commitment to economic development in Ukraine.

Created for scholars, research workers, postgraduates and students of higher education institutions, as well as for all those interested in the implementation of the Association Agreement.

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PART III

JUSTICE, FREEDOM AND SECURITY

Association agreement: driving integrational changes

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Decorruption of Ukraine: the role of anti-corruption programs implemented in the framework agreements on association between Ukraine and the EU

The fight against corruption has been one of the key priorities of the national reform agenda since 2014. The anti-corruption programs implemented prior to the Revolution of Dignity, implemented since the late 1990s, merely mimicked the fight against corruption. At that time, the counteraction to corruption, especially at the level of top officials, was primarily aimed at billing between competitors rather than eradicating the informal destructive practices. Over the last five years Ukraine has adopted an anti-corruption regulatory framework, created new anti-corruption bodies, created and operates anti-corruption non-governmental organizations, created anti-corruption journalism and more. The public inquiries made during the Revolution of Dignity (which we regard as the strongest manifestation of the anti-corruption protest in Ukraine) resulted in the adopted Law of Ukraine “On Prevention of Corruption” (2014), which would seem to launch a real aggressive anti-corruption campaign as demanded the situation in the country.

However, the declared willingness of the ruling elite to actively support such changes gradually declined after the revolutionary uplift. Determination and consistency (as in Singapore, for example) was not observed in the reform process. Even noticeable was the latent or open resistance of some Ukrainian high-ranking officials to anti-corruption reforms, most notably the creation of the Supreme Anti-Corruption Court of Ukraine. This goes to show once again that an effective anti-corruption policy requires not only proper administration and funding but, above all, political will. This will for the rapid and irreversible reforms of the Ukrainian authorities has been lacking for many years and many important international recommendations on the prevention and combating of corruption have not been implemented. Finally, the fact that the wave-like rise of the anti-corruption public movement has not become irreversible cannot be ignored. Researchers note that after the Revolution of Dignity, “in the face of the actual impunity of corrupt officials, a kind of recession of the civic consciousness soon began to be observed” [Kushnarov, 2017, p. 80]. At the same time, in our opinion, thanks to the international support a powerful anti-corruption segment of the civil society is operating in Ukraine today.

Unfortunately, in the world Ukraine retains the image of a highly corrupt state. By the latest (2018) measurements of Transparency International our country ranks 120th in the Corruption Perceptions Index. Such positions of Ukraine are quite outsider even among the post-Soviet countries: we are ahead of the Baltic states, Georgia and even Belarus, Armenia and Moldova. At the same time there is a certain upward trend: if we look at the Corruption Perceptions Index for 2014, our country ranks 142nd and was ranked as the most corrupt country in Europe. Despite the improvement of Ukraine's assessments over the last five years, our country's anti-corruption progress is extremely slow: the Ukrainian authorities have not yet established themselves as a decisive and consistent factor in the anti-corruption policy. Some important sound international recommendations have not yet been implemented. Real anti-corruption reforms require, first and foremost, the Ukrainian society, and our country's international partners, such as the EU, agree to support only if a number of harsh conditions are met.

The causes of the large-scale corruption in Ukraine are seen in a number of reasons, not least in the high level of tolerance of corruption of the population (it is, first of all, about domestic corruption). On the one hand, the level of the public condemnation of corruption among the Ukrainian citizens is growing, the population's tolerance for corruption is critically low, and the awareness of the long-term threats of corruption and the dangers of further tolerant corruption is forming. On the other hand, the worldview of the Ukrainians remains ambivalent about the coexistence of the two opposites: corruption is perceived as a negative phenomenon, but its existence is allowed as an alternative way of solving the problem (especially of a private nature, in matters of expected benefit). This is an example of ambivalence as a characteristic of the political and legal culture of the Ukrainians: on the one hand, the citizens see corruption as one of the biggest problems hindering the progress of the modern Ukraine and, on the other, resorting to corrupt practices motivated by the corruption pragmatism.

Given this, it is difficult to predict whether in the near future the Ukrainian community will reach the level of real practical intolerance for corruption. In the move to such an outcome, the role of an external factor (international institutions) can be the driving force behind the constructive change. An argument for this may be that it is thanks to the international partners that Ukraine has achieved certain anti-corruption results, for example:

- quality of the administrative services provided to the population has improved significantly. This is evidenced by the results of the opinion polls: the number of those who point to corruption cases in the course of receiving administrative services is decreasing;
- modern anti-corruption mechanisms have been implemented, such as the electronic revenue declaration system, the public procurement platform

ProZorro, and others. It should be noted that not only international cooperation but also the pressure of the civil society have contributed greatly.

Despite these and other achievements, the Ukrainian society and the international community are experiencing rather limited results from anti-corruption policies, especially in the judging high-level corruption cases, controlling assets, conflicting interests of the public servants, and managing corruption and other risks. In addition, the Ukrainian anti-corruption activists are increasingly facing pressure, especially in the regions.

From the first days after the Revolution of Dignity, the EU has actively supported the fight against corruption in Ukraine. The establishment and effective functioning of a truly independent National Anti-Corruption Bureau of Ukraine and the Specialized Anti-Corruption Prosecutor's Office were requirements for Ukraine to obtain a visa-free regime from the EU and for a previous macro-financial assistance program for Ukraine. These anti-corruption bodies were therefore created with the broad support of the EU and the donor countries. In particular, the EU lobbied for the creation of a High Anti-corruption Court and expressed its readiness to support the selection of the judges.

In 2014 the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, was signed as one of the fateful documents for Ukraine in terms of both preventing and combating corruption and the overall vector of our country's development, on the other hand (hereinafter referred to as the Association Agreement). This document launched a reform of Ukraine's legislative framework to harmonize the national regulatory framework with the EU acts. Upon its entry into force on 01.09.2017, the Association Agreement resulted in a number of positive results for Ukraine. However, the maximum effectiveness of the implementation of this document cannot be ascertained, since the insufficient institutional capacity of the ministries is an obstacle to meeting the objectives of the Association Agreement on time and in full.

The Association Agreement identified anti-corruption as one of the priorities for Ukraine. In particular, Art. 3 defines the fight against corruption as one of the main principles for strengthening the EU-Ukraine relations; Art. 14 stipulates that the cooperation between Ukraine and the EU in particular is aimed at combating corruption. Art. 22 pays close attention to the fight against crime and corruption in both the private and the public sectors. The cooperation between the parties to the Association Agreement concerns: the sharing of investigative techniques; exchange of information; training and staff exchange; issues related to the protection of witnesses and victims. Chapter 8, "Public Procurement" (Art. 151), focuses on concluding government contracts by Ukraine through transparent and impartial procedures for determining a contractor that will prevent corruption. Art. 459 obliges the parties to take effective measures to prevent and combat

corruption, in particular through mutual administrative assistance and mutual legal support.

The Association Agreement states that the rule of law and the fight against corruption are one of the main principles for strengthening the relations between the parties. That is, the success of anti-corruption policy is an important component of our country's European integration perspective. Therefore, our main task is to find out the peculiarities of the implementation of the Association Agreement in the field of prevention and combating corruption in Ukraine, to ascertain what results and methods in the issues of prevention and combating corruption have already been achieved.

Each year the European Commission prepares a report on each of the countries with which the EU visa-free regime is in force on the fulfillment of the "visa-free" criteria. In the last such report on Ukraine most of the requirements concerned the fight against corruption, one of which was the urgency of restoring the independence of the Specialized Anti-Corruption Prosecutor's Office [Report, 2018]. In case of non-compliance with this and other important requirements, the visa-free regime of Ukraine with the EU may be suspended or revoked. The EU also expressed serious concern in 2017-2019 that a legislative initiative on the electronic declaration of anti-corruption activists had not been withdrawn; it was only by a decision of the Constitutional Court of Ukraine that such a declaration was recently declared (06.06.2019) illegal.

For a long time the EU's concern was the lack of a functional system for the automated verification of the electronic declarations. The automatic e-declaration verification is currently running: on 25.09.2018 the National Anti-Corruption Agency adopted a module for the automatic verification of electronic declarations, which allows to compare the information in the filed declarations with the information from the open registers and to make all declarations on the corruption risk index. This is a very important step forward for Ukraine, given the large number (about 2.7 million) of declarations in the registry.

In general, any steps back from the reforms that have been launched, including anti-corruption ones, can cause visa liberalization to be lifted for Ukraine. It is obvious that the EU expects from the Ukrainian side real results of the fight against corruption, in particular sentences for top corrupt officials. Against this background, the high-level EU officials have high expectations of the High Anti-corruption Court of Ukraine. But now the experience of combating corruption in Ukraine in recent years shows that Ukraine has gone beyond limiting the scope for practicing corruption schemes rather than punishing the corrupt officials. At the same time, the EU is in the position that an effective fight against corruption in Ukraine is possible only with the coordinated interaction of all the authorized structures in order to achieve a common result.

The EU views corruption in Ukraine as a consequence of inefficient public administration. It has been repeatedly suggested at the level of European integration institutions that the new anti-corruption bodies will not be immune from political pressure on them. Therefore, it was feared that given the imbalanced results of the fight against corruption, Ukraine would be among the most openly corrupt countries in the world.

At present, the attention of the European integration institutions is drawn to the problem of physical attacks on the anti-corruption activists expressed in Ukraine, which have increased in recent years, as well as the inadequate investigation of the attacks on their lives, health, property, honor and dignity, etc. This problem is obvious, as in recent years there have been many cases of unlawful acts and omissions against the anti-corruption activists and their families. Among the most resonant of them are: an attempt on the life of activist K. Gandzyuk, that caused her subsequent death; assault on the anti-corruption activist V. Ustimenko; grievous bodily harm to the head of the NGO “Pure Wave” O. Filipas; assault on the head of the Kharkiv anti-corruption center D. Bulakh; the murder of the anti-corruption activist M. Berchuk; attempted murder of the editor-in-chief of the online publication “The Public Inquiry” H. Kozma and journalist-accuser M. Kuzakon; the opening of administrative and criminal proceedings, and later the murder of the anti-corruption activist, journalist of the “Time of Justice” V. Oleshko and others. The task of bodily harm to an anti-corruption activist “StateWatch” expert, O. Lemenov, became a resonant crime; the organization to which he belongs informally controls the spending of the public funds in the sphere of defense, monitors the anti-corruption bodies and the bodies of pre-trial investigation and prosecutor’s office, etc. There have been repeated instances of privacy violations and anti-corruption activists being monitored. Discrimination campaigns against anti-corruption NGOs (the “Center for Combating Corruption”, “Transparency International – Ukraine”, etc.) and individual activists were launched in the media, especially on the social networks. A type of prosecution of the anti-corruption activists in Ukraine is the opening of criminal cases against them. A popular way of discrediting the anti-corruption workers is to accuse them of corruption. The Polish political scientist R. Kordonski said that “pressure, harassment, discredit in response to criticism from anti-corruption NGOs could indicate an increase in anti-democratic tendencies in Ukraine and a veiled interest of the authorities in pressure on the anti-corruption activists” [Kordonski, p. 19].

The aforementioned and numerous other cases of pressure on the anti-corruption witnesses: those actors in the civil society of Ukraine whose prerogative is anti-corruption are at high risk. The EU therefore expects Ukraine to step up its efforts to bring those responsible to account for such crimes. The EU has repeatedly emphasized that the Ukrainian side of the Association Agreement should first investigate the cases of pressure and hate speech against the anti-corruption activists and journalists.

While the EU's primary expectation was the institutionalization of the Specialized Anti-Corruption Prosecutor's Office and the High Anti-corruption Court of Ukraine, then, after launching their work, the EU's most important hopes relate to the issues of independence and lack of the political pressure on the anti-corruption bodies, anti-corruption prosecutors, and anti-corruption prosecutors of the Supreme Anti-corruption Court of Ukraine. While the EU's assessments have noted Ukraine's success in terms of narrowing its scope for corrupt practices by the ruling elite, it emphasizes the need for a number of radical and rapid steps to consolidate the progress in the key areas. The most critical criticism of the EU continues to be the question of bringing the representatives of the Ukrainian establishment to justice: the political system itself has not changed enough and stands for the protection of the top officials.

In its relations with Ukraine the EU has consistently emphasized that our country needs to make greater efforts to secure the rule of law. The EU has raised concerns about the functioning of the newly created anti-corruption institutions in Ukraine. For example, since the very beginning of its operation, the National Anti-Corruption Agency has become a source of socio-political tension, during which the public raised the question: whether the leadership of this body is truly independent and whether efforts are being made to verify the declarations of the state and local officials [Lough & Dubrovskiy, 2018].

The EU implements projects in Ukraine aimed at empowering the civil society at the national and local levels to promote integrity and participation in the processes of monitoring corruption and political dialogue. Grants are provided to the national civil society organizations to accomplish a number of tasks, such as monitoring the situation in the fight against corruption and the performance of the institutions; establishing the political dialogue with the government and anti-corruption institutions, raising awareness of the fight against corruption; pilot implementation of tools for the assessment of the corruption risks and risk management in selected public sectors/institutions. Of particular importance to the EU's anti-corruption projects under the Association Agreement is the support for investigative journalism, various media initiatives to investigate specific cases of corruption, and the preparation of the programs of journalistic investigations of corruption cases.

Currently, the EU's main activity is to prevent and counteract corruption in Ukraine is focused on the implementation of the EU Anti-Corruption Initiative in Ukraine (EUACI), the EU's largest anti-corruption program of expertise and technical assistance to Ukraine. The program is funded by the EU and co-financed and implemented by the Danish Agency for International Development. On 01.06.2017 was the official launch of this three-year initiative. During the EUACI program the main vectors of cooperation are: assistance in the development of anti-corruption bodies, assistance to the parliamentary committee in assessing the corruption risks of

the draft laws, as well as a three-vector component consisting of a number of grant programs for the civil society organizations, assistance to investigative journalism and the project “Cities of Integrity”. Firstly, projects aimed at monitoring activities and implementing the principles of transparency and accountability in the local self-government, involving young people in finding innovative ways of preventing and combating corruption, etc. are supported.

The EUACI program aims to ensure the sustainability of the anti-corruption reforms in Ukraine that have already been implemented and to further enhance the anti-corruption efforts at the national and local levels. The main objective of the EUACI is to strengthen the capacity of the anti-corruption bodies by providing advisory and expert support to the anti-corruption bodies of Ukraine. The program aims to assist the local governments and NGOs in preventing and combating corruption. The EUACI is committed to enhancing the institutional capacity of the Verkhovna Rada Committee on Anti-Corruption Policy.

The EUACI is lobbying for the adoption of a new Anti-Corruption Strategy of Ukraine, a state program for its implementation, mechanisms for implementation, as well as the importance of ensuring the inevitability of punishment for the corruption offenses and the formation of zero tolerance to the phenomenon in the society. The EU Anti-Corruption Initiative in Ukraine is assisting the ProZorro team.

The EU implements the Anti-Corruption Initiative of the “Cities of Integrity” that covers five settlements (Zhytomyr, Mariupol, Nikopol, Chervonohrad, Chernivtsi). The project implements such initiatives as the city’s open budget, open budget for schools, e-reception and a number of others. Such an initiative is an example of the implementation of the anti-corruption mechanisms at the level of the local governments.

The EUACI actively supports the automation of the pre-trial investigations into corruption proceedings (a draft of the digitization of the criminal proceedings at the National Anti-Corruption Bureau of Ukraine and the Specialized Anti-Corruption Prosecutor’s Office). It is planned to create a system that will help translate the whole criminal process into an electronic form. This will allow the anti-corruption authorities to save resources and time spent investigating and processing the documents, as well as to optimize the cooperation of the National Anti-Corruption Bureau of Ukraine, the Specialized Anti-corruption Prosecutor’s Office and the High Anti-Corruption Court of Ukraine.

Thanks to the EUACI the geoinformation system “Geoportal” is launched in Ukraine, a state-of-the-art IT-system aimed at providing the citizens and entrepreneurs with information on various areas of the urban infrastructure. The external interface of the “Geoportal” provides maps with various information, including: city cadastre, critical social infrastructure, including schools, kindergartens, hospitals, investment properties, rental

properties, and more. Therefore, the “Geoportal” will enable higher transparency and accelerate the transition to electronic document flow.

The EU pays particular attention to combating corruption in the East of Ukraine. To this end the “EU Project Office” was opened in Mariupol. One element of the EUACI support is to assist the local authorities through the implementation of effective procedures and processes, as well as the provision of anti-corruption tools such as the aforementioned “Geoportal” for Mariupol, an effective G2B and G2P tool developed with EUACI’s support as part of the “Cities of Integrity” project to improve the city council internal processes, facilitate access to data, organize them as understandable and convenient for the citizens, civil society organizations, the media and the business community.

The EU Anti-Corruption Initiative joins a variety of creative actions through which it accomplishes its immediate objectives. Here are some examples:

- organization of the exhibition “Ukraine Without Corruption” (American House in Kyiv, 11.12.2018-26.01.2019);
- support for the presentation of the performance (documentary) “Temporary Inconvenience”, delivered by NGO “Point of View” on 10.04.2019 on the topic of corruption in the Ukrainian society;
- “Corruption Park” is an interactive project aimed at raising awareness among the Ukrainians about corruption and its forms of confrontation. It was organized on 01-30.06.2018 in the National Botanical Garden named after M. Gryshko of the NAS of Ukraine. More than 30,000 people visited the “Corruption Park”;
- organization of the quest “Path Without Corruption” during the celebration of Europe Day in Kyiv (18.05.2019). The main purpose of the quest was to inform the public about the grantees of the EU Anti-Corruption Initiative (Movement “Honestly”, NGO “Institute for the Development of Regional Press”, the independent investigative agency Investigation.Info, etc.) and the projects they embody.

On 08.07.2019 within the framework of the “Ukraine-EU” Summit the Government of Ukraine and the European Commission signed a five-year financing agreement for the “EU-Ukraine Phase II - Anti-Corruption Initiative (EUACI) Program”. As a result, Ukraine will receive financial assistance from the EU and the Danish Government of 22.9 million Euro to effectively implement the anti-corruption policies, which will ultimately reduce the level of corruption in the country. The assistance under the “EUACI - Phase II” Program will focus on the following areas: strengthening the independence and effectiveness of the anti-corruption institutions; improving governance and transparency at the local level and more.

The EUACI organizes trainings on informant work for the NABU staff, training seminars for the judges of the Supreme Anti-Corruption Court. In particular, with the support of the EUACI and other international donors, an

Orientation Program for the judges of the Supreme Anti-corruption Court of Ukraine was conducted. The EU Anti-Corruption Initiative in Ukraine is focused on providing expert and advisory assistance to the judges of this judicial body on an ongoing basis. With the support of the EU Anti-Corruption Initiative in Ukraine (August 2019) Jessup Summer School 2019 held a series of lectures on the development of the anti-corruption infrastructure in Ukraine for the law students in Ukraine.

The EU is working to provide comprehensive and sustainable support for the internal transformation of the society and new opportunities for the investigative journalism. In particular, the EU Anti-Corruption Initiative in Ukraine promotes the international festival of the investigative journalism “Mezhyhrya Fest” (this festival has been held since 2014 in the territory of the former residence of V. Yanukovych). The EUACI also supports a program for 50 investigative journalists from different regions of Ukraine to develop their practical skills in preparing investigations into corruption cases.

One of the main focuses of the second phase of the EUACI Program is the development of a culture of integrity in the Ukrainian society. It is, first of all, about: further support of the institutional development of the anti-corruption institutions of Ukraine; improving governance, transparency and accountability at the local level; enhancing the participation of the citizens, the civil society and the private sector in promoting integrity, the rule of law and good governance. Such goals are absolutely justified in view of the current characteristics of the anti-corruption political and legal culture of the Ukrainian population and the place of anti-corruption values in the system of the political and legal mentality. Here we agree with the right assessment of I. Kushnarov who believes that in Ukraine “there is a valuable confrontation between “anti-culture of corruption” and “anti-corruption culture” [Kushnarov, 2018, p. 317]. Whatever the number of the strategies, concepts, doctrines, etc., were not adopted, the successful anti-corruption policy is “impossible without fundamental shifts in the public and individual consciousness, significant positive adjustments in the norms, rules and behaviour of not only the target groups (politicians, civil servants, etc.), but also average citizens [...]” [Kushnarov, 2018, p. 317–318].

Regarding the prevention and combating of corruption in Ukraine, the EU, first of all, has expectations about the effective work of the Supreme Anti-corruption Court of Ukraine, establishment of constructive cooperation between the National Anti-Corruption Bureau of Ukraine and the Specialized Anti-corruption Prosecutor’s Office. There are grounds for such expectations of the EU, since the Supreme Anti-Corruption Court of Ukraine started its work on 05.09.2019. There have also been no recent conflicts (public or hidden) between the detectives of the National Anti-Corruption Bureau and the prosecutors of the Specialized Anti-Corruption Prosecutor’s Office.

Despite the certainly positive appraisals of such projects, the political discourse make sound assumptions that “they will only result if there is a

transparent disposition of the funds, because paradoxically there are situations where the anti-corruption public initiatives themselves can resort to corruption or other forms of corruption” [Kordonski, 2019, p. 16].

So, we summarize our analysis. Clearly, with the exception of the Baltic States and Georgia, no other post-Soviet state has succeeded in a relatively short period of time in implementing so many important measures aimed at narrowing the scope for corruption, while creating new anti-corruption bodies, reforming the existing judicial and law enforcement agencies. However, at present, the results are rather ambiguous and often contradictory, for while important acts have been adopted, new institutions have been created necessary to effectively prevent and counteract corruption, but success has now been achieved more in limiting the opportunities for corruption than in attracting to responsibility the corrupt officials.

Therefore, the important tasks for Ukraine are to strengthen the independence, effectiveness and resilience of the anti-corruption institutions, to enhance the participation of the citizens, civil society, including the private sector, in promoting integrity, the rule of law and good governance and other tasks. Important tasks for Ukraine are to strengthen the institutional capacity of the National Anti-Corruption Agency, the National Anti-Corruption Bureau of Ukraine, the Specialized Anti-Corruption Prosecutor’s Office, the National Agency of Ukraine for the detection, search and management of the assets obtained from corruption and other crimes and financial crimes to implement their mandate independently and effectively.

Ongoing challenges associated with and counteracting corruption indicate that support for Ukraine’s anti-corruption efforts by the international actors, in particular the EU, must continue, but at the same time, the quality of the reforms under way must increase.

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